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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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CABLE NEWS NETWORK, INC.,
*Petitioner,*
v.
GENERAL MANUEL NORIEGA and
UNITED STATES OF AMERICA,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF OF AMERICAN SOCIETY OF NEWSPAPER EDITORS, CAPITAL CITIES/ABC, INC., CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND WESTINGHOUSE BROADCASTING CO., INC., AS AMICI IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the First Amendment permits a federal district court to enjoin a telecast in order to protect a defendant's right to a fair trial where there is no record support or findings establishing that such extraordinary relief is essential or that available alternatives are inadequate.

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**BRIEF OF AMERICAN SOCIETY OF NEWSPAPER EDITORS, CAPITAL CITIES/ABC, INC., CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND WESTINGHOUSE BROADCASTING CO., INC., AS AMICI IN SUPPORT OF PETITIONER**[1]

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## STATEMENT OF INTEREST

These *Amici* are organizations that disseminate the news and associations of journalists, broadcasters, and cable casters. They believe that the ability of journalists to present the news free of prior restraints by government, and the opportunity of the public to receive such news, are central to the First Amendment and essential for a free society. They also believe that the decision below, if allowed to stand, would seriously undermine these First Amendment protections, not only in this case but in future cases.

## THE PETITION FOR CERTIORARI SHOULD BE GRANTED

### I. THE ISSUES ARE IMPORTANT AND ARE FREQUENTLY RECURRING

This is the first case since *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam), in which a federal court of appeals has upheld the imposition of a prior restraint on the dissemination of news. The district court has barred petitioner Cable News Network, Inc. ("CNN") from publishing conversations between General Manuel Noriega and his defense counsel, apparently taped

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[1] Statements of consent are on file with the Clerk of the Court. *See* S. Ct. R. 37.2.

by the government while Noriega was in prison.[2] The constitutional question is of profound significance.

The telecast at issue seeks to address a matter of considerable importance: it is designed to advise the American public of a defendant's claim of potentially serious misconduct by the government in a highly publicized and unusual prosecution of a former foreign head of state.

The effect of the district court's order barring that telecast is not confined to this case. Criminal trials are, by their very nature, newsworthy events, and criminal trials involving claimed misconduct of public officials, whether foreign or domestic, are especially newsworthy. The decision of the court of appeals raises the threat of censorship of a broad range of journalism concerning criminal proceedings. Thus, while the order here directly affects only the publication of taped conversations between defendant Noriega and his counsel, its implications are far-reaching.[3]

The decision of the Eleventh Circuit in this case sustaining an injunction against publication represents an unwarranted and unprecedented invasion of the First Amendment rights of the news media and the public they serve. In four distinct respects the court of appeals has departed from established law. (1) Despite the strong presumption against prior restraints, a presumption as old as the Republic itself, the court of appeals has equated the standards against prior restraint with the standard for a First Amendment right of access and in doing so has substantially diluted the rule against prior restraints. (2) The court of appeals has improperly placed upon the

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[2] The present case does not involve the constitutionality of the district court's initial oral order designed to provide the court with time to deliberate on the issues raised by the motion. *See* Tr. 78-81 (Nov. 8, 1990 Hearing). Nor does this case involve the constitutionality of any contempt citation against CNN for having broadcast a portion of the tapes. *See* Tr. 126-27 (Nov. 9, 1990 Hearing).

[3] *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[T]he protection against prior restraint should have particular force as applied to reporting of criminal proceedings . . . .").

news organization the burden of showing that no injunction should issue, contrary to the decision of this Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and numerous court of appeals decisions. (3) The court of appeals has erroneously held that an admittedly speculative showing of injury is sufficient to justify a prior restraint. (4) The court of appeals has failed to consider alternative means for protecting both the defendant's right to an impartial jury, his right to counsel, and the interests of the United States in maintaining the prosecution.[4]

These *Amici* urge that this Court grant certiorari in this case and order expedited briefing and argument on the merits.

## II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The Eleventh Circuit's decision conflicts with decisions of this Court and of other Courts of Appeals that have uniformly invalidated prior restraints designed to pro-

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[4] As the court of appeals noted, Mr. Rubino, counsel for Noriega, "cooperated with CNN by reviewing an audio tape of conversations purportedly between Noriega and Ms. Cristina Machin ("Machin") (Rubino's secretary and interpreter) and verified the authenticity of the tape recording. A portion of the interview between a CNN reporter and Rubino (together with Machin) in Rubino's office appears in the telecast." *Cable News Network, Inc. and Turner Broadcasting System, Inc. v. Manuel Antonio Noriega and the United States of America*, No. 90-5927, slip op. at 5 (11th Cir. Nov. 10, 1990) (hereinafter "CNN slip op."). This case thus presents the extraordinary spectacle of a defendant in a criminal case who has cooperated in the production of a news broadcast and then seeks to enjoin the broadcast on the ground that its dissemination will deny him the right to a fair trial. These unusual circumstances suggest that the defendant's injunctive request should not have been seriously entertained in the first place since defendant failed to satisfy the traditional standards for equitable relief. *See* C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2946 (1973) (recognizing unclean hands as a basis for denying equitable relief).

tect fair trial rights. Although in *Nebraska Press* the Court may not have completely foreclosed all prior restraints,[5] it recognized that such an order would survive constitutional scrutiny only in the most extraordinary circumstances, *id.* at 558-69, that is, where it was "clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Id.* at 569.

Since this Court's decision in *Nebraska Press*, the courts of appeals have consistently rejected claims that a prior restraint on the press is justified based on the need to protect a defendant's right to a fair trial. In *CBS v. United States District Court*, 729 F.2d 1174 (9th Cir. 1984), for example, the Ninth Circuit vacated an order restraining CBS from "disseminating and/or broadcasting any portion of any and all government surveillance tapes generated in the investigation and prosecution" of John DeLorean. *Id.* at 1176. The Ninth Circuit noted that "federal and state appellate courts have held without exception that trial court restraints on the report-

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[5] The majority opinion did not state that such prior restraints are never constitutional, but three members of the Court did articulate that view. 427 U.S. at 572-73 (Brennan, J., concurring, joined by Stewart and Marshall, JJ.). The District of Columbia Circuit has concluded that " 'the practical impact of the rule announced by [the majority] . . . is to outlaw all prior restraints in fair trial/free press cases,' " *In re Halkin*, 598 F.2d 176, 183 n.14 (D.C. Cir. 1979), *quoting* Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 497, 498 (1977). *See also* L. Tribe, *American Constitutional Law* § 12-11 at 858-59 (2d ed. 1988) (the majority opinion in *Nebraska Press* "suggests that the Court has gone further and announced a virtual bar to prior restraints on reporting news about crime"); 2 ABA *Standards for Criminal Justice* Chap. 8, Standard 8-3.1 (2d ed. 1980) ("ABA Standards") ("No rule of court or judicial order shall be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.").

ing of judicial proceedings failed to meet the requirements set forth in *Nebraska Press*." *Id.* at 1178.

Similarly, in *United States v. McKenzie*, 697 F.2d 1225 (5th Cir. 1983), the Fifth Circuit held that a prior restraint of a CBS 60 Minutes news program was not justified by a defendant's claim that broadcast of the program would impair his Sixth Amendment right to a fair trial. *Id.* at 1227. The Fifth Circuit stressed that in imposing the prior restraint, the district court had failed to make specific factual findings as to the potential prejudice to the defendant arising from the broadcast and the inadequacy of alternative methods of protecting the defendant's interests. *Id.* Other decisions have also held prior restraints unconstitutional.[6] The ruling of the Eleventh Circuit in this case cannot be squared with these authorities.

## III. THE DECISION BELOW IS CLEARLY INCORRECT

The district court's order is a classic prior restraint on the press, and the extraordinary circumstances necessary to justify such a restraint are not even remotely established by this record.

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[6] *See In re Providence Journal*, 820 F.2d 1342, 1348 (1st Cir. 1986) ("When . . . the prior restraint impinges upon the right of the press to communicate news and involves expression in the form of pure speech . . . the presumption of unconstitutionality is virtually insurmountable."), *modified*, 820 F.2d 1354 (1st Cir. 1987) (en banc), *cert. dismissed*, 485 U.S. 693 (1988); *In re King World Productions*, 898 F.2d 56 (6th Cir. 1990) (vacating injunction restraining broadcast of scenes allegedly obtained by illegal surreptitious surveillance); *In re Lifetime Cable*, 17 Media L. Rep. (BNA) 1648 (D.C. Cir. 1990) (vacating order restraining broadcast of minor's description of alleged sexual abuse); *Hunt v. National Broadcasting Co.*, 872 F.2d 289 (9th Cir. 1989) (repecting injunction based on claim that a docudrama's portrayal of a murder conviction might prejudice a trial on a second murder); *Goldblum v. National Broadcasting Corp.*, 584 F.2d 904 (9th Cir. 1978) (vacating a trial court order demanding that a television network turn over a film to the district court so that the court could view it for "inaccuracies"); *see also In re Halkin*, 598 F.2d at 183 n.14 (concluding that "practical impact" of *Nebraska Press* "is to outlaw all prior restraints in fair trial/free press cases").

### A. The Court Of Appeals Erred In Equating The Presumption Against Prior Restraints With The Standards For A Right Of Access By The News Media.

Although the court of appeals acknowledged that the district court's order infringed "CNN's First Amendment right to be free from prior restraints against the broadcasting of newsworthy information," CNN slip op. at 2, it nonetheless relied almost exclusively on cases involving issues of *access* to trial proceedings or documents, rather than *prior restraints* on publication of information, in developing a legal standard for its ruling.[7] The court of appeals thus confused the standards for determining a district court's ability to control who has access to a court proceeding or court document with a court's ability to control what the media does with information it has already obtained. The standards in these two areas of law are not the same.

In the area of access, a trial court may permissibly weigh a defendant's Sixth Amendment right to a fair trial against the right of the press and public to gain access to trial proceedings or documents. In unusual circumstances, where a court specifically finds that (1) public access to trial proceedings or documents will likely prejudice the defendant's right to a fair trial, (2) denial of access will prevent the prejudice, and (3) no alternative to denial of access would adequately protect against

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[7] The court of appeals quoted extensively from *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), which, as the cited portion in the decision below indicated, pertains not to prior restraints on publication, but instead to a trial court's ability to manage the courtroom by limiting "right of access to criminal proceedings." *Id.* at 1209. The court of appeals also misdescribed *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. Unit A Aug. 1981). The Fifth Circuit in that case did not deny broadcasters the right to broadcast audiotapes that were already in their possession, but instead denied the broadcaster's request to copy the tapes from the trial record. Thus, the Fifth Circuit in *Belo Broadcasting* did not "determin[e] that the Constitution did not accord the broadcasting stations the right to play the tapes over the air waves," CNN slip op. at 10; instead, the court in that case merely determined that the broadcasters did not have the right to demand access to the tapes.

the perceived harm, a court may limit the press and public's access to trial proceedings or documents. *Press-Enterprise v. Superior Court*, 478 U.S. 1, 14 (1986).

This case, however, does not pertain to access to trial proceedings or documents at all: CNN already has the tapes, and the only issue is whether the district court can constitutionally restrain CNN from broadcasting information in its possession. In short, it directly raises the issue of whether the district court can impose a prior restraint on CNN. Whatever authority a court may have to regulate access to information about a judicial proceeding, no court, absent the most extraordinary circumstances, may constitutionally restrain the press from publishing information already received.

This Court repeatedly has distinguished between cases pertaining to right of access to trials and documents and those imposing prior restraints. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 (1980) (distinguishing right-of-access cases from prior-restraint cases, where "free speech protections are almost insurmountable"). As Justice Stevens stated in *Press-Enterprise*, 478 U.S. at 17:

> Although perhaps obvious, it bears emphasis that the First Amendment right asserted by petitioner [to have access to a preliminary hearing] is not a right to publish or otherwise communicate information lawfully or unlawfully acquired. That right, which lies at the core of the First Amendment and which erased the legacy of restraints on publication against which the drafters of that Amendment rebelled, may be overcome only by a governmental objective of the highest order attainable in no less intrusive way. The First Amendment right asserted by petitioner in this case, in contrast, is not the right to publicize information in its possession, but the right to acquire access thereto. (citations omitted) (Stevens, J., dissenting).[8]

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[8] *Accord Gannett Co. v. DePasquale*, 443 U.S. 368, 393 n.25 (1979); *id.* at 399 (excluding "members of the press from the courtroom . . . differs substantially from the 'gag order' at issue in *Nebraska Press*") (Powell, J., concurring).

With the exception of the Eleventh Circuit in this case, the courts of appeals have uniformly recognized this distinction.[9]

The exacting standards for the imposition of prior restraints far exceed the showing required for denial of a right of access: prior restraints are uniformly subjected to more stringent (and almost always fatal) scrutiny. In *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), this Court recognized that "it has been generally, if not universally, considered that it is the chief purpose of [the constitutional guarantee of freedom of the press] to prevent previous restraints upon publication." *Id.* at 713. That a system of prior restraint is repugnant to the First Amendment and therefore is presumptively unconstitutional has been the unwavering position of the Court ever since.[10] In *New York Times v. United States*, 403 U.S. 713 (1971), the Court found that even the most pressing concerns of national security urged by the government in that case did not justify the imposition of a prior restraint. And in *Nebraska Press*, the Court, noting that prior restraint of publication is "the most serious and the least tolerable infringement on First Amendment rights," 427 U.S. at 559, struck down a restraining order designed to protect Sixth Amendment fair trial rights in a murder case, making clear that

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[9] *See, e.g., Application of Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988) (order limiting access of press to extrajudicial statements of counsel not a prior restraint); *In re Gannett News Service*, 772 F.2d 113, 116 (5th Cir. 1985) (upholding district court's order sealing evidence because "temporary denial of access such as involved here constitutes no form of prior restraint"); *United States v. Beckham*, 789 F.2d 401, 409 (6th Cir. 1986) (denial of news media's request to copy tape recordings admitted as evidence in criminal trial upheld).

[10] *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) (injunction imposing prior restraint is "an impermissible restraint on First Amendment rights").

such orders are rarely, if ever, permissible. The Court noted that "[t]he Court has interpreted [the guarantees of the First and Fourteenth Amendments] to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous' or 'prior' restraint on speech." *Id.* at 556.

Prior restraints uniquely threaten protected expression. As the Court explained in *Nebraska Press*, sanctions imposed after publication are subject to numerous protections, and their impact does not become fully operative until after appellate review. In contrast, a prior restraint "has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." [11] Those who might otherwise publish and risk punishment will generally be unwilling to defy an injunction and thus face the contempt power.[12]

In short, the party claiming that a prior restraint is justified bears the ultimate burden of justifying the restraint, and this burden is an extraordinarily heavy one.[13]

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[11] 427 U.S. at 559, *citing* A Bickel, *The Morality of Consent* 61 (1975).

[12] *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 460 n.15 (5th Cir) 1980) (en banc), *aff'd*, 452 U.S. 89 (1981). Justice Brennan has provided a catalogue of further reasons for presuming that prior restraints on expression are unconstitutional. *Nebraska Press*, 427 U.S. at 589-90, *quoting* T. Emerson, *The System of Freedom of Expression* 506 (1970).

[13] *See Nebraska Press*, 427 U.S. at 561-65; *see also Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (burden of justifying restriction of speech falls on the censor); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); L. Tribe, *American Constitutional Law* § 12-39 at 1059 (2d ed. 1988).

### B. There Has Been No Showing Of A Compelling Justification For the Injunction Issued Here.

This Court has never upheld a prior restraint as necessary to protect a defendant's right to a fair trial, and the defendant in this case has not come close to establishing that this case qualifies as a first exception. Two separate "fair trial" justifications have been offered here for the injunction—the need to protect the defendant's right to an impartial jury and the need to protect the defendant's right to counsel. Neither the Motion for Injunction filed by defendant Noriega, nor the subsequent hearings before the district court, came close to showing that a prior restraint was justified on either ground.

#### 1. *The Injunction Cannot Be Justified As Designed To Protect The Defendant's Right To A Fair And Impartial Jury.*

Defendant Noriega's Motion for Injunction did not present any facts refuting his ability to secure a fair and impartial jury. It did not address the number of individuals in the jury pool or the likelihood that they would hear the particular CNN broadcast, nor did it show that a broadcast of such material would make it impossible to select an impartial jury. *See* Memorandum in Support of Motion for Injunction at 5-7 (Nov. 1990) (hereinafter "Mem. in Support of Injunction"). The motion also made virtually no effort to show that alternatives were unavailable to protect Noriega's right to a fair trial. It simply noted that "exposure of potential jurors to the defendant's own statements and discussions of trial strategy will make selecting an impartial jury problematic." *Id.* at 6-7. Defendant Noriega in fact claimed that many of the attorney-client communications would not even be understandable without an explanation by defense counsel as to the context of the communication, which counsel was unwilling to provide. Tr. 66-67 (Nov. 8, 1990 Hearing).

The district court order and court of appeals opinion are also largely silent on these issues. Although recog-

nizing that this Court's "pronouncements on the doctrine of prior restraint suggests that a factual inquiry is required," the district court made no findings concerning the potential for the broadcast to so taint the jury pool as to make selection of an impartial jury impossible.[14] And the court of appeals itself recognized that, given the state of the record, it was "required to speculate" as to the threat posed by the broadcast to defendant Noriega's right to a fair trial. CNN slip op. at 17.

A similar absence of factual findings in *Nebraska Press* led this Court to strike down a prior restraint. The prior restraint before the Court in that case was prompted by intense and pervasive publicity surrounding a mass sex murder in a town of 850 people. The defendant was arrested the day after the crime amid "widespread news coverage, by local, regional, and national newspapers, radio and television stations." 427 U.S. at 542. Two days later, the trial court, at the request of the prosecutor and the defense attorney, entered an order restricting press coverage to permit the impaneling of an impartial jury. As ultimately modified and presented to this Court, the order barred only the reporting of the existence and contents of confessions or admissions by the defendant. *Id.* at 545. The Court unanimously agreed that even this limited order was unconstitutional, stating that there was "little in the record" to support such an extraordinary remedy. *Id.* at 563.

Under the present facts, there is no basis for a prior restraint to protect the defendant's right to an impartial jury. The district court made no finding that the over-

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[14] *United States v. Noriega*, No. 88-0079-Cr, Supplemental Order at 3-7 (S.D. Fla. Nov. 9, 1990) (hereinafter "Supplemental Order"). The district court appeared to recognize that its decision was inadequate in this regard, stating: "If the invasion or the propogation of the invasion [of attorney-client communications] is not . . . in and of itself legally sufficient to justify enjoining, certainly it would appear necessary to look to the surrounding facts to determine the nature and extent of potential damage before dissemination." Supplemental Order at 5.

whelming majority of the jury pool would view the telecast. The district court here never determined that, even if the allegations made by defendant Noriega regarding the contents of the tap recordings were true and the potential jurors were uniformly exposed to it, the telecast would have led "surely" and inevitably to an unfair trial.[15] A trial court is not entitled to presume that even "intense and pervasive" publicity involving the disclosure of information damaging to the defense would result in an unfair trial. *Nebraska Press* at 562-65.[16] Rather, the triai court must rely on facts demonstrating that, beyond doubt, "further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Id.* at 569. No such showing was made here.

Moreover, even if such a showing of harm had been made, the district court failed adequately to consider whether there were alternative, less-restrictive, methods of protecting the defendant's right to an impartial jury. *Nebraska Press* requires a trial court "to determine the probable efficacy of measures short of prior restraint on

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[15] *See* Supplemental Order at 4; *United States v. Noriega*, No. 88-0079-Cr, Order at 5-6 (S.D. Fla. Nov. 8, 1990) (hereinafter "Nov. 8 Order").

[16] As *Nebraska Press* makes clear, a trial judge is not entitled to assume that the exposure of potential jurors to publicity makes them incapable of rendering an impartial verdict:

> [P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically . . . to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process."

*Nebraska Press*, 427 U.S. at 565, *quoting Murphy v. Florida*, 421 U.S. 794, 799 (1975). *See also Calley v. Callaway*, 519 F.2d 184, 205-06 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976).

the press and speech." *Id.* at 565.[17] In making this determination, the trial court must bear in mind that the Sixth Amendment right to a fair trial is guarded by a formidable array of protective measures, including change of venue, trial postponement, searching voir dire examination, curative jury instructions, and sequestration. *Id.* at 563-64. This Court has found these measures adequate to withstand huge barrages of publicity adverse to the defendant. Even where there has been "massive pretrial publicity" in the trial court, the Court has concluded that "these procedures would have been sufficient to guarantee [the defendant] a fair trial . . . ." *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1986). Accordingly, any benefits from intruding upon First Amendment freedoms to protect fair trial right here were "conjectural . . . in light of the alternative procedures available to the trial judge." [18]

The district court here did not address any of these potential alternative measures for ensuring defendant Noriega's right to an impartial jury. That fact alone makes the imposition of a prior restraint intolerable under the First Amendment, as *Nebraska Press* and decisions of other circuits following *Nebraska Press* make clear. *Nebraska Press*, 427 U.S. at 563-65; *Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986); *In re Providence Journal*, 820 F.2d at 1351; *CBS*, 729 F.2d at 1182; *Levine v. United States District Court*, 764 F.2d 590, 595, *cert. denied*, 476 U.S. 1158 (1986); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 99 (3rd Cir. 1988).

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[17] In other contexts, as well, this Court has repeatedly held that, where government action infringes upon First Amendment liberties, the action is unconstitutional if the asserted government interest may be adequately served by alternative measures less offensive to the First Amendment. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). *See also Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296-97 (1961); *Lamont v. Postmater General*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring); *Martin v. City of Struthers*, 319 U.S. 141 (1943).

[18] ABA Standards at 30 (commentary to Standard 8-3.1).

In failing to make factual findings concerning the potential taint of the jury pool and the availability of less-restrictive alternatives to a prior restraint, the district court and court of appeals made much of the fact that CNN did not produce the tape recordings in its possession for review. Supplemental Order at 2-5; CNN slip op. at 16-17. The district court stated:

> It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court—that is, to allow CNN to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that no clear and immediate harm yet appears is because CNN has so far prevented this court from reviewing the content of the tapes in its possession.

Supplemental Order at 3. That CNN failed to produce the tape recordings, however, cannot provide a basis for the imposition of a prior restraint.

First, there was simply no need for the district court to view the tapes. Even assuming that they contained highly damaging information, there was no basis for a prior restraint. The general subject matter of the tapes was known to the district court. By focusing on the content of the tapes, the Court ignored its obligation to consider far more relevant factual questions, and the defendant's obligation to make a specific and compelling factual showing that a prior restraint would be justified even assuming the exposure of damaging information.

Second, by placing the onus on CNN to come forward with information, the court improperly shifted the burden to CNN to justify its broadcast. As noted above, the burden of justifying a prior restraint rests always with the movant.

Finally, the district court failed adequately to explain why it could not obtain the tape recordings from the government. To be sure, the district court stated that "[r]equiring Government production would require the Magistrate to review all of the recorded phone calls be-

tween Noriega and his attorneys—potentially hundreds of calls between Noreiga and his attorneys—in search of damaging attorney-client communications." Supplemental Order at 3.[19] That review of the CNN tapes would be "more efficient" than securing the tapes from the government—a step that will eventually be required in any event to discover the extent of the government's misconduct—hardly justifies a prior restraint.[20] It is not surprising that other courts have rejected the claim that the need for access to unpublished information justifies prior restraints.[21]

The district court's order that CNN produce the tape recordings for its review also raises the spectre of impermissible judicial censorship. Once a court commands submission of proposed broadcast material for evaluation of whether the material may properly be disseminated, the power to edit the submission follows ineluctably. With the materials in hand, the court no longer must approve or disapprove the whole, but can pick and choose, approving and disapproving a particular broadcast sentence by sentence. As then Judge (now Justice)

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[19] We note that the government has supplied a log of these tapes to the district court, although the contents of this log were never disclosed to petitioner CNN. *See* Tr. 105-06 (Nov, 9, 1990 Hearing).

[20] The district court also noted that it "is entirely possible that CNN is in possession of communications between Noriega and his lawyers . . . which the Government did not record." This finding is entirely speculative, however. No suggestion was made at the hearing before the district court to indicate that CNN had obtained any recordings other than those made by the government. *See* Tr. 97-99 (Nov. 8, 1990 Hearing).

[21] *See Goldblum*, 584 F.2d at 906 (holding production order of film unconstitutional where "[t]he express . . . purpose of the district court's order . . . was to determine whether or not to issue an injunction suspending its broadcast"); *In re CBS*, 570 F.Supp. 578, 581 (E.D. La. 1983) (holding unconstitutional a "production order . . . to aid the court in deciding whether to enjoin the scheduled broadcast"), *appeal dismissed*, 735 F.2d 907 (5th Cir. 1984).

Kennedy explained in similar circumstances in *Goldblum*, 584 F.2d at 907:

> The district court proceedings . . . intervened in the editorial process by ordering . . . the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. A procedure thus aimed toward prepublication censorship is an inherent threat to suppression, one that chills speech.[22]

The censor's power to edit need not, and typically does not, rest on formal autohrity to edit. Sufficient is the power to block publication of the material as submitted, while suggesting that if only suitable modifications were made, the new text would receive the imprimatur. A federal judge rests his editorial suggestions on the foundation of power to order that the publication not issue on pain of contempt sanctions.[23] Such editorial suggestions are not easily distinguished from commands.[24]

### 2. *The Injunction Cannot Be Justified As Protecting Privileged Information or Defendant's Right To Counsel.*

While the court below also sought to justify the injunction as designed to protect the defendant's right to counsel, Supplemental Order at 2-4, no showing was made that the prior restraint imposed here was necessary to preserve the privileged nature of Noriega's conversations with members of his legal defense team or his Sixth Amendment right to effective assistance of counsel.

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[22] As Milton wrote more than three hundred years ago, the publication that emerges comes to the reader or viewer "under the wardship of an overseeing fist." J. Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England, in *The Portable Milton* 151, 180 (D. Bush ed. 1949).

[23] If the suggestions are followed and no injunction issues, the censorship will almost certainly escape appellate review. *Cf. Goldblum*, 584 F.2d at 906 n.2.

[24] *See* V. Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 80 (1982).

Governmental intrusions into private communications between criminal defendants and their lawyers can inhibit free exchanges between defendant and counsel, *Weatherford v. Bursey*, 429 U.S. 545, 554-55 n.4 (1977), and potentially jeopardize constitutional values. *Id.* at 562-63 (Marshall, J., dissenting).[25] They may, under certain circumstances, deprive defendants of their Sixth Amendment rights and require vacation of their convictions.[26]

Here, however, there is a serious question as to whether the attorney-client privilege has been waived. The court of appeals recognized that there was no showing in the district court that Noriega's attorney-client privilege was violated since, among other things, Noriega may well have waived his privilege so that "the privilege may not be assertable." CNN slip op. at 16.

Even if a showing had been made that the privilege had been preserved, Noriega's Sixth Amendment right to effective assistance of counsel or the attorney-client privilege has already been violated by the government's creation of the tapes, and that violation is already complete. The district court clearly acknowledged as much, stating that the interest in ensuring the confidentiality of these communications "has already been frustrated by the very fact of invasion [by the government]." Nov. 8 Order at 2-3. There is no evidentiary basis for a finding that publication would have any incremental effect whatsoever on the freedom with which Noriega will

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[25] Such intrusions can prejudice a defendant if information gained from the interference is used against him at trial. Prejudice can also result "from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial." *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980).

[26] *See id.* at 558; *Black v. United States*, 385 U.S. 26 (1966) (per curiam); *O'Brien v. United States*, 386 U.S. 345 (1967) (per curiam).

in the future discuss defense strategy and other issues with his counsel. Either the recording will cease, or continued recording—whether or not the recordings are published—will inhibit the defendant's communications. Publication of the tapes will also have no constitutionally significant impact on the steps necessary to protect Noreiga's Sixth Amendment right to effective assistance of counsel at his eventual trial. To the extent that the government, in creating the tapes, invaded Noriega's attorney-client privilege or violated his Sixth Amendment rights, protective steps will be required whether or not the tapes are published.[27] If the government is found to have acted improperly in creating the tapes, it will likely be required to show—by demonstrating lack of prosecutorial access, nonuse of the taped conversations, or otherwise—that there has been no prejudice to defendant Noriega.[28] Neither the district court nor the court of appeals cited any authority for the proposition that a private party's publication of the tapes would in any way preclude, or make more difficult or less effective, a later assertion by Noriega of the attorney-client privilege.[29] Surely a prior restraint cannot be justified, as the district court did, as merely a "symbolic and prophylactic" act.[30]

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[27] *Weatherford v. Bursey*, 429 U.S. at 554-56; *see, e.g., United States v. Kelly*, 790 F.2d 130, 136-38 (D.C. Cir. 1986); *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984).

[28] Neither Noriega nor the government has questioned the scope of the district court's authority to impose procedural safeguards in the trial to preserve the privileged nature of Noriega's communications with his lawyers and to protect his Sixth Amendment right to counsel. Noriega, in fact, expressly recognized the district court's ability to fashion "appropriate relief" for any invasion of his Sixth Amendment rights. Mem. in Support of Injunction at 6 n.1.

[29] *Cf.* 18 U.S.C. § 2517(4) ("No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.").

[30] Nov. 8 Order at 3.

While the United States speaks of preserving defendant Noriega's right to a fair trial by the injunction,[31] it is obvious that the government supports the injunction as necessary to enable it to go forward with the prosecution. No case of which we are aware has authorized a prior restraint to protect the government's right to prosecute, to enhance its ability to prosecute, or to minimize the procedural hurdles which the government must overcome to present certain pieces of evidence in a criminal trial. Such a restraint would not be appropriate. The government's "right" to prosecute Noriega, of course, is not protected by the Bill of Rights, and the government has wholly failed to establish that an injunction for this purpose is necessary on the facts presented here.

Publication may, to be sure, give rise to an additional avenue of prosecutorial access to the conversations and information contained in the tapes. To that extent, it may impose an additional burden of rebuttal on the government.[32] But the potential additional burden of rebuttal which publication of the tapes might create for the government is a common problem. Evidence that originally came into existence or that came to light through some form of police or prosecutorial misconduct often is then widely disseminated in the media and through other means. Prosecutors have thus had extensive experience with the need to demonstrate that their evidence is not tainted by improper electronic surveillance,[33] by improper

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[31] Brief for the United States at 6, *Cable News Network, Inc. and Turner Broadcasting System, Inc. v. Manuel Antonio Noriega and the United States of America*, No. 90-5927 (11th Cir. Nov. 10, 1990).

[32] In this case, for example, in order to enhance its ability to show the absence of taint on the prosecution, the Department of Justice has apparently already taken steps to keep the prosecution team from hearing or reading news reports of the contents of the tapes, and the Department would be in a position to attest to that fact by affidavit in further judicial hearings on this question. Tr. 3-4 (Nov. 10, 1990 Hearing).

[33] *See Black*, 385 U.S. at 27-29 (1969); *Alderman v. United States*, 394 U.S. 165, 180-85 (1969); *Sinclair v. Schriber*, No. 89-

use of undercover agents,[34] by improper reliance on immunized testimony,[35] or by other types of police or prosecutorial misconduct.[36] And the courts have had correspondingly extensive experience in evaluating the sufficiency of the proof offered in such circumstances and deciding whether the prosecution's case is free from taint. The fact that the original source of the taint has become known to the public, through the media or otherwise, has never been thought to necessarily preclude prosecution, and the techniques employed by the prosecutors and courts to avoid the taint in these analogous situations are equally applicable here.[37]

There was no evidence—and no finding—that the judicious employment of such procedures by the prosecution and the district court would be insufficient to protect both the defendant's right to counsel and the possibility that the government could pursue its case.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the case should be set for expedited briefing and argument.

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1875, slip op. (6th Cir. Oct. 23, 1990) (1990 U.S. App. LEXIS 18468); *Clark v. Wood*, 823 F.2d 1241, 1249-50 (8th Cir. 1987), *cert. denied*, 484 U.S. 945 (1987).

[34] *See Weatherford v. Bursey*, 429 U.S. at 554-56; *United States v. Ginsberg*, 758 F.2d 823, 833-34 (2d Cir. 1985).

[35] *See Kastigar v. United States*, 406 U.S. 441, 460-62 (1972); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 & n.18 (1964); *United States v. North*, 910 F.2d 843, 853-55 (D.C. Cir. 1990).

[36] *See Segura v. United States*, 468 U.S. 796, 804-05 (1984); *Nix v. Williams*, 467 U.S. 431, 441-44 (1984); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

[37] *See, e.g., United States v. Poindexter*, 698 F. Supp. 300, 312-13 (D.D.C. 1988); *United States v. North*, 910 F.2d at 855-56.

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